IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION N0. 10611 OF 1993

WITH

SPECIAL CIVIL APPLICATION NO. 10612 OF 1993

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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INDIAN RED-CROSS SOCIETY

Versus

VIDYABEN H VYAS

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Appearance:

1. Special Civil Application No. 10611 of 1993
   MR K.M.THAKKAR for M/S TRIVEDI & GUPTA
   for Petitioner No. 1
   MR PV HATHI for Respondent No. 1
   RULE SERVED for Respondent No. 2
2. Special Civil Application No. 10612 of 1993
   MR K.M.THAKKAR for M/S TRIVEDI & GUPTA
   for Petitioner No. 1
   MR PV HATHI for Respondent No. 1

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CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 27/08/2003

COMMON ORAL JUDGEMENT

In both these petitions, on behalf of the petitioner learned advocate Mr.K.M.Thakkar is appearing and learned advocate Mr. P.V.Hathi is appearing on behalf of the respondent No.1.

2. In both the petitions, the petititoner-Society has challenged the order passed by the controlling authority as well as the appellate authority under Payment of Gratuity Act, 1972 ('the Act' for short). At the time of issuing notice by this Court in both the petitions, this Court has passed the following order:

"Notice returnable on 1.11.93. The petitioner to deposit the entire amount as per the award of the controlling authority. The amount to be deposited before 1.11.93 before the controlling authority. On complying with the aforesaid direction, ad interim stay in terms of para 10(B). The learned counsel for the petitioner assures that the amount will be deposited."

The aforesaid order has been passed by this Court on 11.10.1993. Then this Court has issued Rule on 19.8.1994. The order passed by this Court on 19.8.1994 is quoted as under:

"It appears that pursuant to the order dated 11.10.1993 the petitioner has already deposited the due amount with the controlling authority. It is stated on behalf of the petitioner that the amount includes the interest as available on the said amount. Considering the question as to whether the Indian Red-Cross Society is subjected to the provisions of the Gratuity Act or not and in view of the other incidental questions, the matter is required to be considered in depth.

Rule returnable on 19.10.1994.

Mr. P.V.Hathi, ld. Advocate, waives service of Rule on behalf of respondent no.1.

Affidavit-in-reply, if any may be filed within 15 days of receipt of Notice of this Court and Rejoinder thereto if any, be filed within one week thereafter.

It is made clear that the Controlling authority may deposit the said amount in short Term Fixed Deposit with any Nationalised Bank and the respondent no.1 may be given the interest accruing on such deposit, without prejudice and subject to the result of this petition."

In both the petitions, this court has passed identical orders and granted identical relief by passing first order on 11.10.1993 and second order on 19.8.1994. On behalf of respondent No.1 in both the petitions, affidavit-in-reply has been filed by the respondent.

3. Learned advocate Mr.P.V.Hathi has submitted that inspite of having a direction from this court to the petitioner to deposit the entire amount as ordered by the controlling authority, the petitioner has not deposited the entire amount. But in case of Vidyaben Harilal Vyas the petitioner has deposited the amount of Rs.28326.00 before the controlling authority and in case of Valiben, the amount of Rs.26625.00 has been deposited before the controlling authority. According to Mr. Hathi this being not the entire amount as ordered by the controlling authority.

4. In both the petitions the respondents have filed application before the controlling authority under the Act claiming the amount of gratuity from the petitioner. Before the controlling authority, the contention raised by the petitioner is that there is delay in filing the application by the respondents and also to the effect that the Act is not applicable to the petitioner-Society and petitioner-Society is not a 'commercial establishment' and therefore, the Act itself is not applicable. Except that, no other contention was raised before the controlling authority by the respondents. This contention has been dealt with by the controlling authority and ultimately the controlling authority has come to the conclusion that the petitioner-Society is covered by the definition of 'Industry' under Section 2 (J) of the Industrial Disputes Act, 1947 as well as being an establishment under Section 1 sub-clause (3) (b) of the Act. This finding was arrived at by the controlling authority on the basis of oral and documentary evidence produced by respective parties. Ultimately, on the basis of length of service, salary, which is not in dispute between the parties, the controlling authority has granted the amount with 10% interest in favour of the respondents. The order was passed by the controlling authority on 30.7.1991 in both the matters. Thereafter, the petitioner had filed appeal before the appellate

authority under the Act. The appellate authority has rejected the appeal on the ground of delay in filing the appeal as well as not to deposit the amount as ordered by the controlling authority being a precondition to file appeal before the appellate authority. Therefore, the appellate authority has come to the conclusion that beyond 120 days appellate authority having no powers to condone the delay and to entertain the appeal and, therefore, on both the grounds the appeal has been dismissed by order dated 30.11.1992. Thereafter, the petition has been filed by the petitioner on 7.10.1993 though there was objection raised by the respondents in reply that there is delay in filing the petition and the petitioner challenging both the orders passed by the controlling authority and the appellate authority.

5. Learned advocate Mr. Thakkar appearing on behalf of the petitioner has raised the contention that petitioner-Society is not an establishment within the meaning of Payment of Gratuity Act, 1972. He also submitted that while condoning the delay in filing the application before the controlling authority by the respondent, the controlling authority has not given any reason in support of its order. He also submitted that the Act itself is not applicable to the petitioner-Society and, therefore, the controlling authority has no jurisdiction to entertain such application and to pass order against the petitioner. In support of his submissions, he relied upon one decision of the Apex Court in the case of V. SASIDHARAN V. M/S PETER AND KARUNAKAR AND OTHERS, AIR 1984 SC 1700. Relying on this decision, Mr. Thakkar has submitted that a lawyer or of a firm of lawyers is not a "commercial establishment" and therefore Kerala Shops and Commercial Establishments Act is not made applicable by the Apex Court in coming to the conclusion that a lawyer office is not a shop and also not a commercial establishment. Therefore, Mr. Thakkar has submitted that similarly, the petitioner-Society is not a shop and not a commercial establishment and, therefore, Payment of Gratuity Act, 1972 is not applicable. Mr. Thakkar has also relied upon one decision in the case of J.J.SHRIMALI V. DISTRICT DEVELOPMENT OFFICER, MEHSNA AND OTHERS, 1990(1) LLN 982. Relying upon that decision, Mr. Thakkar has submitted that a periodical appointment made by the petitioner-Society and by efflux of time if the termination is taken place, that is not a retrenchment and Section 2(oo) (bb) is applicable and therefore, such termination is outside the scope of definition of 'retrenchment'. Except the above submissions, no other submission has been made by Mr. Thakkar before this

court and no other decision has been relied on by the learned advocate Mr. Thakkar.

6. Learned advocate Mr. P.V.Hathi appearing on behalf of the petitioner has submitted that the Act made it very clear in Section 1(3) and (3-A) that, it is not necessary that establishment must be a commercial establishment. He submitted that the controlling authority has considered the oral evidence and activities carried out by the petitioner-Society and come to the conclusion that the petitioner-Society is an 'establishment' within the meaning of definition given under the Act. He also submitted that the Act has not made clear in Section 1 (3)(a) (b) (c) and (3-A) that it cannot be a commercial establishment. In the provision, merely establishment has been referred or mentioned but not commercial establishment. Therefore, Mr. Hathi has submitted that the decision of the Apex Court relied upon by the petitioner is not applicable to the facts of the present case. Mr. Hathi has also submitted that under Rule 7, application for gratuity is required to be filed by the employee ordinarily within a period of 30 days from the date the gratuity become payable in Form I to the employer. Mr. Hathi has also relied upon Rule 7 clause (5) of the Payment of Gratuity (Central) Rules, 1972 to the effect that an application for payment of gratuity filed after the expiry of the period specified in this rule shall also be entertained by the employer, if the applicant adduces sufficient cause for the delay in referring his claim, and no claim for gratuity under the Act shall be invalid merely because the claimant failed to present his application within the specified period. Any dispute in this regard shall be referred to the controlling authority for his decision. Therefore, Mr. Hathi has submitted that the object of the Act and the Rules is that, the benefit of gratuity cannot be denied to the employee only on the ground that he has not filed application within prescribed time limit. Therefore, learned advocate Mr. Hathi has submitted that the contention which has been raised by the petitioner that the Act is not applicable, is not correct and according to the provisions made in the Act, the Act is applicable to the petitioner-Societry and, as such, delay has rightly been condoned by the controlling authority. Therefore, according to him, the appellate authority has also rightly not entertained the appeal after the period of 120 days under the provisions of the Act and, Limitation Act is not applicable to the appeal filed by the petitioner before the appellate authority. Therefore, according to him both the authorities have rightly passed an order and, for that, none of the

authorities has committed any error which require any interference by this Court while exercising the powers under Article 227 of the Constitution of India.

7. I have considered the submissions made by both the learned advocates and I have perused the order passed by both the authorities.

8. Before the controlling authority the hearing was fixed between 8.1.1991 to 31.5.1991. The application was preferred by the respondent on 10.12.1990 and the respondent retired on 31.12.1989. Before the controlling authority the respondent was examined wherein he deposed about length of service, salary and various activities carried out by the petitioner-Society. On behalf of the petitioner one Mr. Maniar Vipinchand was examined who also gave deposition about various activities carried out by the petitioner-Society and length of service and salary of the respondent. In the deposition of the petitioner witness Mr. Maniar Vipinchand he admitted the facts that petitioner-Society is covered within the definition of 'Establishments' under the provisions of the Act. But, it is not covered under the definition of 'Industry' of Industrial Disputes Act, 1947. The controlling authority has considered the aforesaid evidence lead by the respective parties and come to the conclusion that the delay which has been occurred in filing the application before the appellate authority has been condoned. No doubt, no reasons have been given by the controlling authority while condoning the delay in filing the application. But it is also necessary to note that no specific contention has been raised by the petitioner before the controlling authority or raised any objection before the controlling authority about filing the application after the period of one year or not within time limit. It was the contention raised before this Court first time by the petitioner. From the perusal of the order itself it is reflected that no such contention was raised by the petitioner in the oral evidence or in the written statement submitted before the controlling authority. Therefore, when there was no objection from the petitioner against the delay occurred in filing the application, naturally, the controlling authority is right in condoning such delay without giving any reason. But, apart from that, looking to the object of the Act and the Rules, the claim of gratuity cannot be considered to be invalid only on the ground that application is not filed within time limit. Therefore, according to my opinion, the controlling authority has not committed any error in not giving any reason for condonation of delay in filing the application.

Thereafter, the controlling authority has considered various activities carried out by the petitioner-Society and ultimately, come to the conclusion that the petitioner-Society is covered by the definition of 'Establishments' under the Act and the Act is applicable to the petitioner-Society, result that the workman is entitled the amount of gratuity under the Act. Therefore, ultimately, the controlling authority has directed to the petitioner to make the payment of gratuity amount with 10% interest under Section 7 sub-clause (4) (b) of the Act. This order was passed by the controlling authority on 30.7.1991 and appeal was filed on 2.12.1991 after a period of 5 months, that is, not within the period of 120 days as prescribed under the Act. The written submission was made before the appellate authority by the petitioner and on behalf of the respondents also written submissions were made objecting the delay condonation application filed by the petitioner. Two contentions were raised by the respondents before the appellate authority; one is that delay is not within the time limit and the second is that the appellate authority has no jurisdiction to condone the delay beyond 120 days and amount has not been deposited being a precondition before the controlling authority by the petitioner and therefore, due to delay Appeal is required to be dismissed. This aspect has been considered by the appellate authority at page 30, internal page 3 of the order that whether appellant is entitled to file appeal after a period of 120 days and, without depositing the amount the appeal can be entertained by the appellate authority or not under the provisions of the Act and, whether the Act is applicable to the petitioner-Society or not. After raising this issue, the appellate authority has come to the conclusion that the petitioner had filed appeal after a period of four months and beyond 120 days, therefore, considering the provisions of Section 7 that appeal is required to be filed within 60 days and further extension of 60 days which comes to 120 days but the appeal was filed beyond that period, therefore, appeal was not entertained by the appellate authority. Provision under Section 7 of the Act provide that that appeal is required to be filed within 60 days and further 60 days if any delay, appellate authority has power to condone it. But the appeal has crossed both the period , that is, beyond 120 days, therefore, appellate authority has not entertained the same. The second aspect has also been examined by the appellate authority that while filing the appeal, the amount which has been ordered by the controlling authority is required to be deposited being a precondition which was undisputedly not deposited by the

petitioner-Society and, therefore, considering this aspect, the appellate authority has rejected the appeal on 30.11.1992.

9. Now, considering the above background, the provisions made in the Payment of Gratuity Act, Section 1 sub-section (3) (a) (b) (c) and 3 (A), Section 4 sub-section 1 & 2, Section 7 sub-section 7 & 8 are quoted as under:

(3) It shall apply to,-

(a) every factory, mine, oil field, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

(3-A) A shop or establishment to which this Act has become applicable shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time after it has become so applicable falls below ten.

4(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,-

a) on his superannuation, or
b) on his retirement or resignation, or
c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment

of any employee is due to death or disablement:

Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution as may be prescribed, until such minor attains majority, if no nomination has been made, to his heirs.

Explanation.- For the purpose of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

4(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of an employee who is employed in a seasonal establishment and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days' wages for each season.

Explanation.- In the case of a monthly-rated employee, the fifteen days wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

7(7) Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of receipt of the order, prefer an appeal to

the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days:

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the Controlling Authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4) or deposits with the appellate authority such amount.

7(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the Controlling Authority.

10. The above provisions are related to decide the controversy which has been raised by the petitioner before this court. Under Section 1 (3) of the Act, there is nowhere referred 'commercial establishments' but merely referred 'establishments'. This aspect has been examined by the Apex Court in the case of STATE OF PUNJAB V. LABOUR COURT, JALLLUNDER AND OTHERS, 1980 (1) SCC PAGE 4. While incorporating Section 1 sub-section 3, in para 3, the Apex Court has observed that Section 1 sub-section 3(b) applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State. The very contention raised by Mr. Thakkar has been negatived by the Apex Court while observing as under:

" The expression comprehensive in its scope and can mean law in relation to shops as well as, separately, a law in relation to establishments or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. Had Section 1 (3) (b) intended to refer to a single enactment,

surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments both commercial and non-commercial. The Punjab Shops And Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting Section 1(3) (b), to refer to a law relating to commercial establishments it would not have left the expression 'establishments' unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to Section 1(3) (b) urged before us on behalf of the appellant."

In light of the above observations the relevant paragraph 3 is quoted as under:

"In this appeal, the learned Additional Solicitor-General contends on behalf of the appellant that the Payment of Gratuity Act, 1972 cannot be invoked by the respondents because the Project does not fall within the scope of Section 1(3) of that Act. Section 1(3) provides that the Act will apply to:

(a) every factory, mine, oil field, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

According to the parties, it is clause (b) alone which needs to be considered for deciding whether the Act applies to the Project. The Labour Court has held that the Project is an establishment within the meaning of the Payment of Wages Act,

Section 2(ii) (g) of which defines an "industrial establishment" to mean any "establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form or power is being carried on". It is urged for the appellant that the Payment of Wages Act is not an enactment contemplated by Section 1(3)(b) of the Payment of Gratuity Act. the Payment of Wages Act, it is pointed out, is a Central enactment and Section 1(3)(b), it is said, refers to a law enacted by the State legislature. We are unable to accept the contention. Section 1(3)(b) speaks of "any law for the time being in force in relation to shops and establishments in a State". There can be no dispute that the Payment of Wages Act is in force in the State of Punjab. Then, it is submitted, the Payment of Wages Act is not a law in relation to "shops and establishments". As to that, the Payment of Wages Act is a statute which, while it may not relate to shops, relates to a class of establishments, that is to say, industrial establishments. But, it is contended, the law referred to under Section 1(3)(b) must be a law which relates to both shops and establishments, such as the Punjab Shops and Commercial Establishments Act, 1958. It is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression "law" in Section 1(3)(b). The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. Had Section 1 (3) (b) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments both commercial and non-commercial. The Punjab Shops And Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting Section 1(3) (b), to refer to a law relating to commercial establishments it would

not have left the expression 'establishments' unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to Section 1(3) (b) urged before us on behalf of the appellant. Section 1(3)(b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an industrial establishment within the meaning of Section 2(ii)(g) of the Payment of Wages Act. Accordingly, we are of opinion that the Payment of Gratuity Act applies to an establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on. the Hydel Upper Bari Doab Construction Project is such an establishment, and the Payment of Gratuity Act applies to it."

Therefore, in light of above observations, Apex Court held that "establishments' having a wide meaning, it includes commercial establishments as well as non-commercial establishments and no limited meaning can be given to the word 'establishments' which has been referred in Section 1(3)(b) of the Act and, therefore, contention raised by learned advocate Mr. Thakkar cannot be accepted and same is rejected.

11. Similar question has been raised before the Punjab and Haryana High Court to the effect that whether Indian Red Cross Society is an 'Industry' or nor within the meaning of Section 2(J) of the Industrial Disputes Act, 1947. Punjab and Haryana High Court has taken the decision in case of INDIAN RED CROSS SOCIETY V. ADDITIONAL LABOUR COURT, CHANDIGARH & OTHERS, 1994 (3) LLJ (SUPPL.), 919. The relevant discussion made in paragraph 6 is quoted as under:

"As already observed, the said case dealt with the State activities and not with the activities of the institutions which are statutory or companies. In the present case, the society is a corporate body like a registered company. In Bangalore Water Supply's case 1978 52 F.J.R.

197, it has been held by the Supreme Court that the term 'industry' as defined in Section 2(j) of the Act has a wide import. According to the Supreme Court in the said case, whether there is: (i) systematic activity, (ii) organised by co-operation between employer and employee (the direct and substantial element is chimerical), (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss, e.g., making, on a large scale, prasad or food) prima facie, there is an 'industry' in that enterprise. If the organisation is a trade or business it does not cease to be one because of philanthropy animating the undertaking. Applying the said tests, it was held that (i) professions, (ii) clubs, (iii) educational institutions, co-operatives, (iv) research institutes, (v) charitable projects, and (vi) other kindered adventures, if they fulfill the triple tests listed above, cannot be exempted from the scope of Section 2(j). In view of this authoritative pronouncement, it could not be successfully argued that the society is not an industry within the meaning of Section 2(j) of the Act."

12. While considering Section 1(3) (b) of the Payment of Gratuity Act, whether the word 'commercial' which has been used in the said provision; it only covered the 'commercial establishments' or 'non-commercial establishments' or 'charitable institutions' or not, the said question has been examined by the Madras High Court in the case of MANAGEMENT OF GOOD SAMARITAN RURAL DEVELOPMENT PROJECT V. T.A.RAMAIAH & OTHERS, 2003 (I) CLR PAGE 3, wherein, the Madras High Court has held the Hospital to be an 'establishment' to which Payment of Gratuity Act applies. The relevant discussion made in paragraph 9 is quoted as under:

"A careful perusal of the order passed by the appellate authority would reveal that it had not only traced the facts and circumstances encircling the whole case, but also would go through each and every ground of appeal and based on such facts and the position of law, would analyze the controlling authority's order and decision and the manner in which it has been arrived at and would take up two points for its consideration, viz., (i) whether the Payment of

> Gratuity Act will not apply to the appellant hospital? and (ii) whether, in any event, the reasonable amount of gratuity would be Rs.6,473 on the basis of basic pay of Rs.850 and dearness allowance of Rs.279 per month? Taking up the issues one by one and applying the facts with the position of law as it is prescribed under section 1(3)(b) of the Payment of Gratuity Act and remarking that the establishment is covered by the Minimum Wages Act, 1948, and since the hospital is an 'establishment' within the meaning of section 1(3)(b) of the Payment of Gratuity Act, 1972, and remarking that there is no distinction made between both these Acts, pertaining to the meaning of 'establishment' and further there is no classification made under the law between an institution which is run on commercial basis and a minority institution which is run on the charitable basis so far as the applicability of the Act is concerned. Therefore, for the first point framed, the appellate authority would arrive at the conclusion holding that the eye hospital run by the management falls within the meaning of section 1(3)(b) of the Payment of Gratuity Act, 1972."

13. The second contention which has been raised by learned advocate Mr. Thakkar that the Act is not applicable, this is also based on the same submissions because the petitioner-Society is not a commercial shop or establishment. The above observations are enough to cover the answer to this contention and therefore, this contention is also required to be rejected. In respect to the reason which is not given by the controlling authority is referred above. No such specific contention was raised by the petitioner-Society before the controlling authority about the delay in filing the application by the respondents and therefore the controlling authority has rightly condoned the delay for which the controlling authority having the power to condone the delay and, therefore, reason has not been given. Apart from that a plea which has not been taken before the controlling authority by the petitioner-Society, however, it is raised before this Court first time, which, this Court cannot entertain in view of the decision given by the Apex Court reported in the case of KRISHI UTPADAN MANDI SAMITI THROUGH ITS SECRETARY, ANAND NAGAR V. ARVIND CHAUBEY AND ANOTHER, 2003 (1) LLJ page 507. Therefore, that contention is also required to be rejected.

14. It is necessary to note that Section 4 of the Act provide that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years. The employer shall pay the said amount to the employee without any delay. Looking to the facts of this case, though the respondent is retired on 31.12.1989, the amount of gratuity is not paid to the employee till he filed the application before the controlling authority. The statutory provision cast obligation upon the employer to make immediately a payment to the concerned employee who is entitled the said benefit under the provisions of the Act. No payment has been made by the petitioner-Society to the respondent and that is how ultimately he made an approach to the controlling authority for claiming the benefit under the Act. Therefore, the obligation cast upon the employer and that is how compelled the employee to file such application before the controlling authority under Section 7 of the Act. Sub-section 3 gives the mandate to the employer that employer shall arrange to pay the amount of gratuity within a period of 30 days from the date it become payable to the person to whom gratuity is payable. If, in case, the payment is not made, then interest is required to be paid by the employer. Section 7, sub-section 7 provides that appeal against the order passed by the controlling authority under Section 7, sub-clause 4, a person aggrieved, may file an appeal within a period of 60 days and in case, if within 60 days appeal is not filed, the period has been extended by the statutory provisions for further period of 60 days, meaning thereby that, in all, within 120 days, the appeal must have to be filed by the employer, if aggrieved by the order of the controlling authority. In the facts of the present case, undisputedly the appeal has been filed after 120 days. When the statute itself provide limitation then Limitation Act is not applicable. This aspect has been examined by the Division Bench of Calcutta High in the case of CITY COLLEGE CALCUTTA V. STATE OF WEST BENGAL AND OTHERS, 1987 (1) LLJ PAGE 41. The relevant observations made by the Division Bench of Calcutta High Court in paragraphs, 6, 7 and 8 are quoted as under:

(6) The appropriate Government under Section 3 of the Payment of Gratuity Act appoints the Controlling Authority for administration of the provisions of the said Act. In holding any enquiry under sub-section(4) of Section 7 of the said Act, the Controlling Authority does not

function as a regular Court. The sub-section (5) of Section 7 of the Act makes some and not all the provisions of the Civil Procedure Code applicable to enquiries under sub-section (4) of Section 7 of the Payment of Gratuity Act for any person aggrieved by the order, prescribed period of limitation for preferring an appeal under Section 7 of the Act being sixty days. the proviso to Section 7(7) of the Act lays down 'provided that the appropriate Government or the Appellate Authority, as the case may be, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days'. The appellate authority under sub-section (7) of Section 7 of the Payment of Gratuity Act is not a Court but an executive authority who has been vested under Section 7(7) of the said Act with quasi-judicial powers. Therefore, on the authority of the Supreme Court decision in the case of Sakuru V. Tanajt (supra) we are bound to hold that the Appellate Authority under Section 7(7) of the said Act which is not a Court has no jurisdiction to invoke Section 5 of the Limitation Act 1963 and to condone delay in preferring an appeal more than one hundred twenty days from the date of the receipt of the order passed under Section 7(4) of the Payment of Gratuity Act, 1972. The decision in the case of Sakuru V. Tanaji (supra) being binding upon us, we need not consider the scope and effect of sub-section (2) of Section 29 of the Limitation Act, 1963.

(7) In his impugned order the Appellate Authority has rightly pointed out that in view of sub-section (7) of Section 7 of the Payment of Gratuity Act, 1972, appeals must be filed within 60 days from the date of the receipt of the order by the Controlling Authority. Under proviso to sub-section (7) of Section 7 of the said Act the Appellate Authority may extend the said period of 60 days by a further period of 60 days if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period of 60 days. In the above view, after expiry of 120 days from the date of the receipt of the order passed by the Controlling Authority there could be no scope for further extending under Section of the Limitation Act the

period prescribed by the law for preferring an appeal under Section 7(7) of the Payment of Gratuity Act against the order passed under sub-section (4) of Section 7 of the said Act.

(8) For the foregoing reasons, we hold that the Appellate authority did not commit any jurisdictional error by refusing to condone the delay beyond 120 days in preferring the appeal of the petitioner. The appeal provided under Section 7 of the Payment of Gratuity Act, 1972 is not before any Court. The Act has vested an executive authority with judicial quasi judicial powers in order to enable it to act as the Appellate Authority. In view of the decisions of the Supreme Court mentioned hereinbefore it is no longer open to us to consider whether or not by force of Section 29(2) of the Limitation Act, 1963, the provisions of Sections 5 to 25 of the said Act have been made applicable only in case of appeal and applications under any special law be presented to Courts of law and not to persona designata or administrative authorities."

15. Whether appeal before the appellate authority under the Payment of Gratuity Act, 1972 is competent after the total period of 120 days is over from the date of order passed by the controlling authority under section 7 sub-section 7 of the Act. Whether Limitation Act is applicable to the proceedings before the appellate authority under the Act. This question has been examined by the Andhra Pradesh High Court in the case of WARANGAL DISTRICT CO-OPERATIVE SOCIETY LTD. V. APPELLATE AUTHORITY UNDER PAYMENT OF GRATUITY ACT, 1972 AND OTHERS, 2002 (3) LLJ 616. The relevant discussion made in paragraphs 10 and 11 are quoted as under:

"10. Sovereign Legislature (Parliament) is competent to create such legal fictious as the one created under Section 29(2) of the Limitation Act and also competent to prescribe the limitation of such fictions.

11. However, the difficulty in this case is that the limitation prescribed under the Payment of Gratuity Act, once again an enactment made by Parliament is only 60 days for the purpose of preferring an appeal. Under the proviso to Section 7, sub-section (7), the appellate authority is empowered to 'extend the period' of limitation by another sixty days. In other

words, the appellate authority is empowered to condone the delay to upper limit of another sixty days beyond the prescribed period of limitation. No doubt, the Payment of Gratuity Act does not expressly exclude the operation of the Limitation Act, but the fact remains that the Payment of Gratuity Act is of the year 1972 where the Limitation Act is of the year 1963. the settled principle of interpretation of statutes is that if there are two mandates by the Sovereign Legislature, the later of the two shall prevail. Therefore, the fact that there was no express exclusion of Section 5 of the limitation under the Payment of Gratuity Act makes no difference while construing the scope of the power of the appellate authority constituted under the Payment of Gratuity Act, to condone the delay in preferring the appeals. the legal position enunciated by the supreme Court in Shantilal M. Bhayani V. Shanti Bai (supra), in my view, must be understood in the context of the Limitation Act, 1963, and the special period of limitation, prescribed in any other special or local law prior to the date of the enactment of the Limitation Act. It is worthwhile mentioning that the Tamil Nadu Buildings (Lease and Rent Control) Act, which is the subject matter of the issue before the Supreme Court in the above case was of the year 1960."

16. The question is whether under Section 7 sub-section 7 of the Act without depositing the amount as ordered by the controlling authority whether appeal can be maintainable before the appellate authority under the Payment of Gratuity Act, 1972 or not. This question is also examined by the Madras High Court in the case of SPECIAL OFFICER, KANNIYAKUMARI DISTRICT CO-OPERATIVE PRINTING WORKS LTD., THUCKALAY V. APPELLATE AUTHORITY UNDER PAYMENT OF GRATUITY ACT, TIRUNELVELI AND OTHERS, 2001 (1) LLJ 1078. The relevant discussion made in paragraph 2 is quoted as under:

"After hearing learned counsel for both sides, I am of the view that the writ petition deserves to be dismissed for the reasons stated hereunder. Second proviso to sub-section (7) of Section 7 of the Act reads as under:

"Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of receipt of order, prefer

an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days.

Provided further that no appeal..."

A reading of the second proviso makes it clear that in order to entertain an appeal by an employer under the said provision, the deposit of the amount ordered by the Controlling Authority is mandatory. sub-section (7) stipulates that any person aggrieved by an order made under Section 4 can prefer the appeal within 60 days and the first proviso to sub-section (7) provides for further period of 60 days within which if the appeal had been filed with sufficient explanation for not preferring the appeal within the first period of 60 days, the appeal could be entertained. But in either case, if the deposit of the amount ordered by the Controlling Authority is not made as provided under the second proviso to sub-section (7) or the first proviso to the sub-section, there would be no scope for the first respondent to entertain the appeal. Admittedly, the petitioner has not deposited the amount ordered by the Controlling Authority within the said period of 120 days as provided under sub-section (7). On the other hand, it is established beyond doubt that the deposit was made nearly one year and seven months after the date of receipt of the order of the Controlling Authority. The first respondent therefore rightly rejected the appeal on that sole ground that the appeal had been filed beyond the period prescribed under the provisions of the Act. When the appeal was not filed in the manner in which it ought to have been filed, it cannot be held that even if the memorandum of appeal grounds had been filed within the stipulated time without necessary deposit to be made under the

second proviso to Section 7(7), the appeal was filed within time. When statute has prescribed a specific period and also made it mandatory for the party intending to prefer an appeal against the order of the Controlling Authority that along with the appeal the proof for deposit of the amount ordered by the Controlling Authority should be enclosed, it is incumbent on the party concerned to comply with the said provision in letter and spirit in order to make him eligible to be heard by the Appellate Authority. When the petitioner failed to comply with the mandatory provision, he cannot be heard to complain against the action of the statutory authority functioning under the Act. In such circumstances, the order of the first respondent in rejecting the appeal which was admittedly not filed in the manner prescribed under the relevant provision, there is no scope for interfering with the said order of the first respondent. Therefore the writ petition fails and the same is dismissed."

Same question has been examined by Madras High Court again in the case of MANAGEMENT OF CHRISTIAN MEDICAL COLLEGE AND HOSPITAL V. DEPUTY COMMISSIONER OF LABOUR (APPEALS) AND ANOTHER, 2001 (1) LLJ 1674. The relevant discussion made in paragraphs 10 and 11 is quoted as under:

"10. The interpretation sought to be placed on the second proviso to Section 7(7) if it is to be sustained as contended by counsel for the writ petitioner, the same will defeat the very object of the statutory provision. Identical provisions had been repeatedly upheld and in this case there is no challenge to the constitutional validity of the proviso. There is no basis or justification or reason to restrict the meaning of the expression 'amount of gratuity required to be deposited under sub-section(4)' of Section 7 to sub-section (4)(a) alone. Such a construction will defeat the very object of the enactment, a social legislation.

11. If the Legislature intended to restrict the pre-deposit to clause (a) of sub-section (4) of Section 7, then it would have been provided that the required amount to be deposited under clause (a) of sub-section (4). This is not the statutory provision. further, if such a contention is to be accepted, the object of

> legislation, which has provided for a mandatory provision to deposit the amount, as determined by the controlling authority before filing an appeal, would be defeated. the intention and object of the legislation is also very clear and the second proviso has been introduced with the object of making pre-deposit of the amount determined by the controlling authority as pre-requisite under sub-section (7) of Section 7. Further, in terms of clause (a) of sub-section (4) of Section 7 the deposit is a voluntary deposit by the employer at the threshold, where the employer comes forward with a deposit. such is not the contingency provided for in respect of other clauses in sub-section (4) of Section 7 of the Act."

17. The Division Bench of Calcutta High Court, Andhra Pradesh High Court and Madras High Court has come to the conclusion that limitation is not applicable to the appellate authority being an executive authority vested that quasi-judicial powers and therefore Section 5 to 25 of the Limitation Act do not apply to the persona designata or administrative authorities. There is further provisions made in Section 7 sub-section (7) that no appeal by an employer shall be admitted unless at the time of preferring an appeal, the appellant either produce certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4) or deposited with the appellate authority such amount. Undisputedly, the said proviso of Section 7 sub-section (7) has not been complied with by the petitioner at the time of filing the appeal before the appellate authority. Therefore, considering this entire aspect of the matter and contentions which has been raised by learned advocate Mr. K.M.Thakkar on behalf of the petitioner-Society cannot be accepted and, looking to the statutory provisions made under the Act, which has not been fulfilled by the petitioner-Society and, in view of the observations made by the Apex Court in case of State of Punjab (supra) establishment is not having limited meaning it has wide meaning as interpreted by the Apex Court. It include a non-commercial establishments also. Therefore, after considering these observations made by the Apex Court as well as the Division Bench of the Calcutta High Court and the decision of the Division Bench of this Court which apparently is not applicable to the facts of the present case which is not related to the subject matter of gratuity and, therefore, according to my opinion, the

controlling authority had not committed any error. There is no procedural irregularity committed by either of the authorities including the appellate authority. On the contrary both the authorities have acted within the jurisdiction and with the provisions of the Payment of Gratuity Act, 1972. There is no procedural irregularity committed by either of the authorities. The reasons given by the both the authorities are based on oral as well as documentary evidence produced before them. The finding given by both the authorities is not baseless and perverse. There is no error of law committed by both the controlling authorities.

18. In view of these facts and considering that this Court having very limited jurisdiction while exercising powers under Article 227 of the Constitution of India, the Apex Court has considered this aspect in the case of ROSHAN DEEN V. PREETILAL, 2002 (1) SCC PAGE 100 wherein the Apex Court has observed that while exercising powers under Article 226/227 of the Constitution of India, the purpose of powers conferred on High Court, held, is to advance justice, not to thwart it, even where justice is the by-product of an erroneous interpretation of law, High Court ought not to wipe out such justice in the name of correcting the error of law. The relevant paragraph 12 is quoted as under:

> "We are greatly disturbed by the insensitivity reflected in the impugned judgement rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible legal measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non-suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of U.P. v. District Judge, Unnao). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. the lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the

error of law."

19. In view of the above observations and considering the facts of the case, according to my opinion, there is no substance in the present petition and therefore present petition is dismissed with costs. Rule is discharged. Interim relief stands vacated.

20. Learned advocate Mr. P.V.Hathi has submitted that respondent No.1 employee has died during the pendency of these proceedings and matter is pending before this Court about more than 10 years and if it has been taken into account from the date of orders passed by the controlling authority it comes to more than 10 years. The petitioner has challenged the order, which has apparently no error committed by the controlling authority. Though there was a direction issued by the Court to deposit entire amount, even though, not deposited. Naturally, according to him, the condition on which the stay was granted has not complied then stay having no legal effect and, therefore, he submitted that some cost may be awarded to the petitioner so that, ultimately, the workman will get adequate amount after a period of more than 13 years. Considering the facts of both the cases and submissions made by Mr. Hathi, according to my opinion, the present petition is required to be dismissed with cost. Cost has been quantified Rs.5000.00 for each petition with a direction to the petitioner so make the payment of cost of both the petitions to the respondent; in one case to the legal heirs of the respondent Vidyaben Harilal Vyas and in another case to Valliben within a period of three weeks from the date of receiving the copy of the said order. It is also directed to the controlling authority to immediately make the payment to respective respondents. Whatever amount deposited by the petitioner-Society, interest accrued thereon from time to time be paid within a period of one month from the date of receiving the copy of the said order. If any amount, as per the order passed by the controlling authority including the interest is not covered, then it is further directed to the petitioner-Society to pay remaining further amount to each respondent within a period of one month from the date of receiving the copy of the said order.

(H.K.Rathod,J)

Jayanti*